Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOSE CORPORATION,

Petitioner,

vs.

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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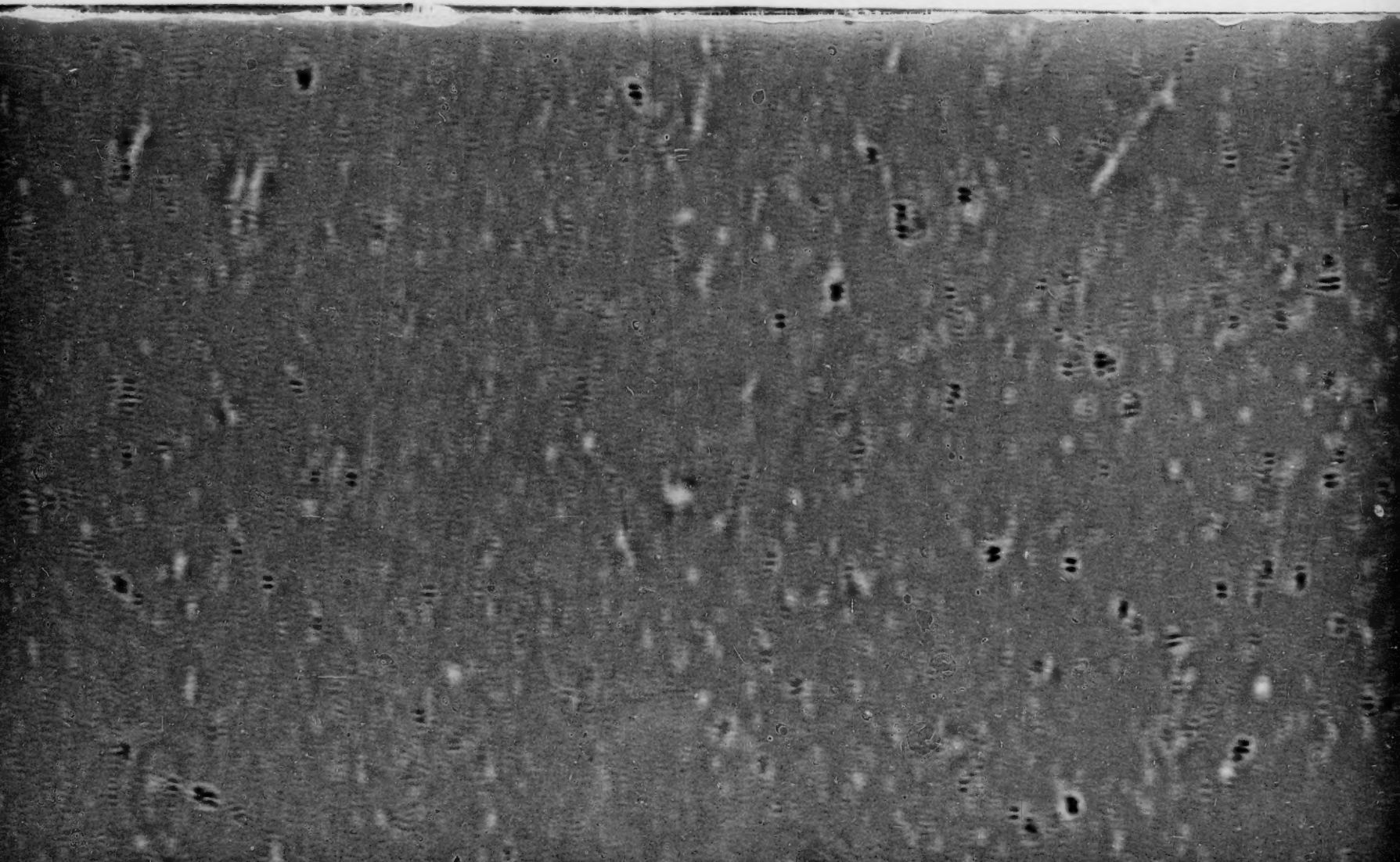

Question Presented

Whether the Court of Appeals was correct in finding that the District Court had not abused its discretion by taxing as costs against petitioner the expense of $5,218.54 incurred by respondent for a letter of credit that the bonding company required to be posted as collateral for a supersedeas bond on respondent's successful appeal.

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CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Consumers Union of United States, Inc., the respondent herein, respectfully opposes the Petition for a Writ of Certiorari filed by the petitioner Bose Corporation.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Contrary to petitioner's assertions, the per curiam decision of the Court of Appeals upholding an award of costs to Respondent of $5,218.54 for a letter of credit to secure a supersedeas bond, is not in conflict with any decision of any other federal Court of Appeals. Although petitioner makes much of the different results reached by the Court of Appeals here and the Second Circuit in Lerman v. Flynt Distributing Co., 789 F.2d 164 (2d Cir. 1986), no true conflict exists. In Lerman the successful appellant borrowed $1,000,000 for use as collateral for a supersedeas bond. It sought to recover as costs the difference between the 15% interest charge it paid on the borrowed $1,000,000 and the amount that would have been made if the money had been invested in a money market. The Lerman appellant put up this money

without court approval only after it could not secure a letter of credit to back its bond. The Second Circuit disallowed the interest charges that appellant sought to assess as costs, holding that such "large or unusual" expenses should be court approved before they can be awarded as costs.

Here, the Court of Appeals sharply distinguished the facts in Lerman pointing out that the costs sought to be recovered there were "unreasonable" (A.5) and were incurred by that appellant with "no attempt to mitigate its expenses." As The Court of Appeals here specifically found no suggestion of large or unreasonable charges or resultant greater total costs by reason of the collateral securing the supersedeus bond.

The Court of Appeals properly based its finding on this Court's decision in that holding

Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964), the standard for reviewing a district court's taxation is abuse of discretion. Where, as here, the costs sought to be recovered are reasonable and did not result in increasing the total cost of a bond without collateral, there has been no abuse of discretion.

Petitioner harps on what it perceives as the failure of the Court of Appeals' decision to include an explicit discussion of the three factors that the Second Circuit stated in Lerman were essential to its earlier contrary holding in Trans World Airlines, Inc. v. Hughes, 515 F.2d 173 (2d Cir. 1975). Although the Court of Appeals did not specifically discuss these factors, they are clearly subsumed within its decision. In fact, an application of those three factors to the facts here demonstrates that respondent's position is very similar to that of the appellant in TWA.

In TWA, while the letter of credit posted by the appellant was in lieu of a supersedeas bond, the appellant was required to post additional security to secure its letter of credit. Similarly, here, respondent was required to post additional security in the form of a letter of credit to secure its supersedeas bond. Like the respondent here, the TWA appellant did not obtain approval by either the Court or its adversary for the posting of the additional security. Finally, as was the case in TWA, there seems little doubt that the combined cost of respondent's bond premium plus its letter of credit fee was less than or, at the very most, equal to the cost of an uncollateralized bond.

As respondent meets the three factors described in Lerman as essential to the TWA result, it is evident that the decision of Court of Appeals is fully consistent with the controlling decisional law in the Second

Circuit. Consequently, there is no conflict here between the decisions of First and Second Circuits.

FRAP 39(e) CODIFIED EXISTING DECISION LAW

As petitioner correctly suggests, FRAP 39(e) is nothing other than the codification of the long-standing holding that the costs of obtaining a supersedeas bond are properly taxed as an item of costs. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products, 316 F.2d 799 (2d Cir. 1966); In re Northern Indiana Oil Co., 192 F.2d 139 (7th Cir. 1951).

In Sunkist the Ninth Circuit specifically allowed more than the bare premium and taxed as costs other expenses incurred in posting the indemnity for the appeal. Petitioner argues that the drafters of Rule 39(e) did not intend to incorporate the Sunkist holding into the Rule. However, the Advisory Committee's

notes concerning the Rule, quoted in the Petition (19), state in effect that Rule 39(e) is the adoption of the existing practice in the Ninth, Second and Seventh Circuits. It strains credulity to suggest that the Advisory Committee would state that it is adopting the Ninth Circuit's practice while at the same time rejecting that Circuit's controlling decision.

In awarding respondent its costs, the Court of Appeals followed the position advanced by the courts in Sunkist and TWA and declined to adopt the position advanced by petitioner here. Moreover, as set out above, its decision is not inconsistent with the Lerman decision. There is therefore no question regarding the interpretation of FRAP 39(e) for this Court to resolve.

Finally, petitioner argues that this Court should grant certiorari merely because the

cost of the letter of credit was greater than the premium paid for the bond. This argument displays a fundamental ignorance of the manner in which supersedeas bonds are financed and ignores the interrelationship between the amount of the bond premium and the amount and kind of collateral posted. Moreover, this argument has nothing to do with the decision of Court of Appeals or the interpretation of FRAP 39(e). However, it does point up one relevant and important consideration for this Court; i.e., the dollar amount involved. The amount involved here is so insignificant that it does not merit the time or attention of this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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